NO. 91-1839

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD BERNARD BAKER
Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, CASE NO. 91-K-2201 APPLICATION FOR GERALD BERNARD BAKER

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner may validly object to a jury charge which, under a ruling of the United States Supreme Court handed down while the present case was on direct appeal, is violative of the Due Process Clause of the Fourteenth Amendment, despite a State Court determination that the Petitioner failed to comply with the Contemporaneous Objection Rule?

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REPORTS OF OPINIONS

The Defendant was found guilty of First Degree Murder in Criminal District Court in Orleans Parish, Louisiana, Case No. 330-597, and on November 30, 1989, the trial court sentenced him to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558 affirmed the verdict on May 30, 1991. An Application for Rehearing filed in the Louisiana Court of Appeal for the Fourth Circuit was denied on August 27, 1991, without written reasons. The Louisiana Supreme Court, No. 91-K-2201 denied the Defendant's Application for a Writ of Certiorari and/or Review to the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, on January 10, 1992. On April 3, 1992, United States Supreme Court Justice Antonin Scalia signed an Order extending the time for filing a Petition for Writ of Certiorari in the present case to and including May 11, 1992.

STATEMENT OF GROUNDS FOR JURISDICTION

The Petitioner seeks review of the opinion of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, rendered on May 30, 1991, rehearing denied, August 27, 1991, without written reasons. The Louisiana Supreme Court, No. 91-K-2201, denied the Defendant's Application for a Writ of Certiorari and/or Review to the Louisiana Court of Appeal for the Fourth Circuit No. 90-KA-0558, on January 10, 1992. On April 3, 1992, United States Supreme Court Justice Antonin Scalia signed an Order extending the time for filing a Petition for a Writ of Certiorari in the present case to and including May 11, 1992. (Appendix D, Order Extending Time; Appendix G, Application for Extension of Time).

This Honorable Court has jurisdiction to review the opinion of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, by Writ of Certiorari under Supreme Court Rule 10.1(c) because the State Court of Appeals decided a question of federal law in a way that conflicts with a decision of this Honorable Court. The Louisiana Court of Appeal affirmed the verdict and sentence in this case, refusing to review the jury charge as to "reasonable doubt" given in this case on the basis of the Contemporaneous Objection Rule even though the same jury charge was held by the United States Supreme Court in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990), to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because a reasonable juror could interpret the instruction as allowing a finding of guilt based upon a lower degree of proof than that required by the Due Process Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supeme Court Rule 10.1(c):

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

On August 25, 1989, during the First Degree Murder trial of the Petitioner, the Trial Judge gave the following instruction to the jury:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the guilt of the defendant, it is your sworn duty to give him the benefit of that doubt and return the verdict of not guilty. This doubt must be a reasonable one, however. That is, one founded upon a real, tangible and substantial basis and not upon a mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty raised in your mind by reason of the unsatisfactory character of the evidence. Likewise, if the State has proved the guilt of the defendant to your satisfaction, and beyond a reasonable doubt, you should return a verdict of guilty. (Appendix H, Transcript of Court's charge to the jury, p. A-103).

Counsel for the Petitioner made an objection based on the confusing language of a portion of the general charge. (Appendix H, Transcript of Court's charge to the jury, p. A-120). At the time of trial, the jury charge as to reasonable doubt was in accordance with established Louisiana jurisprudence, and therefore, the counsel for the Petitioner did not specifically object to the language of the reasonable doubt charge. However, while this case was pending on appeal, the United States Supreme Court held that a jury charge as to the reasonable doubt standard containing the same language as the jury charge at issue in this case violated the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990).

The United States Supreme Court ruled in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990) in November of 1990, while the present case was still pending on direct review by the Louisiana Court of Appeal for the Fourth Circuit, but after all briefs had been filed. Accordingly, undersigned counsel raised the issue of the unconstitutional jury instruction at oral argument before the Court of Appeal for the Fourth Circuit, which, in its opinion of May 30, 1991, dismissed the issue out of hand on the basis of the Contemporaneous Objection Rule. (Appendix A, Opinion of Fourth Circuit Court of Appeal, p. A-36). Undersigned counsel also raised the issue of the unconstitutional jury instruction in his Application for Rehearing, which was denied. (Appendix E, Application for Rehearing in the Louisiana Fourth Circuit Court of Appeal, pp. A-45 - A-48; Appendix B, Notice of Denial of Rehearing in the Louisiana Court of Appeal for the Fourth Circuit). Finally, the issue of the unconstitutional jury instruction was also raised in an Application for Writ for Certiorari or Review to the Louisiana Supreme Court. (Appendix F, Application for Writ of Certiorari or Review to Review a Judgment of Court of Appeal Fourth Circuit, State of Louisiana, pp. A-75 - A-84). The Application for a Writ of Certiorari was denied on January 10, 1992 without written reasons. (Appendix C, Louisiana Supreme Court denial of Writ of Certiorari and/or Review).

ARGUMENT

At the First Degree Murder trial of the Petitioner in August of 1989, the Trial Judge gave the jury an instruction as to the reasonable doubt standard which this Honorable Court has determined is violative of the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990). In November of 1990, while the present case was still pending on direct review in the Louisiana Court of Appeal, the

United States Supreme Court reversed the Petitioner's First Degree Murder conviction and sentence in *Cage* because the jury charge as to reasonable doubt would allow a reasonable juror to "have interpreted the instruction to allow a finding of guilt based upon a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 111 S. Ct. at 330. This Court reasoned that the jury charge in *Cage* required a higher degree of doubt than the reasonable doubt standard, because the charge equated "reasonable doubt" with a "grave uncertainty" and an "actual substantial doubt," and required a "moral certainty." *Id.* at 329.

The jury charge in the present case contained the very language held by this court in *Cage* to be violative of fundamental due process. The trial judge instructed the jury that the doubt must be "one founded upon a real, tangible, and *substantial* basis...as would give rise to a *grave uncertainty* raised in your mind by reason of the unsatisfactory character of the evidence." (Emphasis added) (Appendix H, Transcript of Court's Charge to the Jury, p. A-103). As this Court pointed out in *Cage*, "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 329 - 30. Therefore, under *Cage*, it is indisputable that the jury charge given in the present case violates the Petitioner's fundamental due process rights.

Furthermore, the rule of *Cage* clearly would apply to the present case. In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1986), this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See *Skelton v.*

Whitley, 950 F. 2d 1037, 1038 (5th Cir. 1992) (In dictum, the United States Court of Appeals for the Fifth Circuit stated: "If [the petitioner's] conviction were on direct appeal, the Supreme Court's decision in *Cage v. Louisiana,* ____ U.S. ____, 111 S. Ct. 328, 330, 112 L. Ed. 2d 339 (1990), ... would be directly controlling.") Therefore, *Cage,* as a new rule for the conduct of criminal prosecutions, is applicable to this case, which was pending on direct appeal from the Louisiana trial court at the time the *Cage* decision was rendered.

The only remaining issue is whether a State law procedural bar may be used to deny the Petitioner the right to complain of a jury charge determined by this Court to be a violation of fundamental due process. The reasoning of this Court in *Reed v. Ross,* 468 U.S. 1 (1983) is instructive in the present case. Similarly to the *Cage* opinion, the Court in *Reed* considered the issue of a jury instruction as to the burden of proof in a criminal case in light of the ruling of *In Re: Winship,* 397 U.S. 358 (1970) that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Reed,* 468 U.S. at 3 (citing *In Re: Winship,* 397 U.S. at 364). The defendant in *Reed* was convicted of First Degree Murder and sentenced to life imprisonment. In post-conviction proceedings, he challenged the jury instruction as to lack of malice given at his trial, arguing *Mullaney v. Wilbur,* 421 U.S. 684 (1975) struck down the requirement that the defendant bear the burden of proving lack of malice as violative of due process. *Reed, Id.* at 4. The North Carolina State Courts, however, held that the defendant was barred from raising the *Mullaney* issue in post-conviction proceedings because he did not contest the jury instruction on appeal as required under North Carolina law. The United States District Court subsequently held that Federal

habeas relief was also barred because of the defendant's failure to raise the issue on appeal.

The United States Supreme Court, however, held that the State law procedural bar should not be applied where the defendant could show there was cause for the defendant's failure to raise the issue timely, and resulting prejudice. (The "cause and prejudice" standard). *Reed, Id.* at 11. A defendant has cause for failure to raise his claim under applicable State procedures "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Id.* at 16. This Court reasoned that:

> If we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt State Court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition. *Id.* at 15-16.

The failure to object at trial to the jury charge in the present case was clearly "for cause" because of the novelty of the constitutional question at issue. At the time of trial in August, 1989, the jury charge in question had been upheld several times by the Louisiana Supreme Court, and in fact was again upheld in December of 1989, after the trial in this case, by the Louisiana Supreme Court. *State v. Cage,* 554 So. 2d 39 (La. 1989), rev'd, 111 S. Ct. 328 (1990). See *State v. Messiah,* 538 So. 2d 175 (La. 1988); *State v. Taylor,* 410 So. 2d 224 (La. 1982). Therefore, at the time of trial, the counsel for the Petitioner was aware that the charge in question, which was the standard jury charge as to reasonable doubt given in Criminal District Court for the Parish of Orleans, had been settled under established Louisiana jurisprudence. The counsel for Petitioner clearly

had cause for failure to contemporaneously object because the constitutional claim later arising under the *Cage* decision was "so novel" at the time of trial "that its legal basis [was] not reasonably available to counsel." *Reed, Id.* at 16.

The failure to object in the present case is clearly not an example of a tactical decision made by counsel. *Id.* at 14. Instead, as in *Reed*, the failure to object was "not attributable to an intentional decision by counsel made in pursuit of his client's interest." *Id.* at 14. The cause requirement is met when counsel has failed to raise a "constitutional issue reasonably unknown to him." *Id.*

Federal Courts have consistently exercised their power under habeas review to "look beyond a State procedural forfeiture and entertain a State prisoner's contention that his constitutional rights have been violated." *Id.* at 9. (quoting *Francis v. Henderson*, 425 U.S. 536, 538 (1986); *Fay v. Noia*, 372 U.S. 391, 398-399 (1963)). In determining whether to review a State prisoner's constitutional claim, the Federal Courts will weigh two competing concerns. The first concern is "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of State prisoners." *Id.* at 10. This interest would be further served by granting review in the present case, which involves a clear violation of fundamental due process rights as determined by this Court in *Cage v. Louisiana*.

The competing concern is the "State's interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the Federal Courts were too free to ignore procedural forfeitures in State Court." *Id.* at 10. According to the majority opinion in *Reed*, this concern would not be implicated in the present case. Under *Reed*, a "counsel's failure to raise a claim for which there was no reasonable basis in ex-

isting law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar." *Id.* at 15. Therefore, the Federal Court's empowerment to look beyond a State procedural forfeiture and consider a State prisoner's claim of a violation of his constitutional rights should be exercised in the present case. Such review is not only consistent with the competing concerns traditionally weighed by the Courts, but is also necessary to vindicate the Petitioner's fundamental due process rights. Prejudice clearly exists in that the jury charge in question has been determined by the United States Supreme Court to violate the Due Process Clause of the Fourteenth Amendment, and was the basis in *Cage* for reversing the First Degree Murder conviction. As the Court in *Cage* pointed out, the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure.' " *Cage, Id.* at 329 (quoting *In Re: Winship,* 397 U.S. at 363). As this Court held in both *Reed* and *Cage*, the constitutional foundation of the requirement that guilt must be established beyond a reasonable doubt is the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Reed, Id.* at 3; *Cage, Id.* at 329 (quoting *In Re: Winship, Id.* at 364).

The Petitioner in this case is a man over sixty years of age who has been sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Unless he obtains a judicial remedy in appellate or post-conviction proceedings, he wil spend the rest of his natural life in prison. Therefore, when a substantial right under the Due Process Clause is at issue, the Petitioner should be entitled to the same judicial relief as a defendant who received a sentence of death rather than life imprisonment. Under Louisiana law, when a death sentence is im-

posed, a reviewing court will consider all errors, even if no contemporaneous objection was made, in order to determine whether the verdict was unreliable. *State v. Burrell*, 561 So. 2d 692, 699 (La. 1990), cert. den. 112 L. Ed. 2d 86. The Petitioner in this case is entitled at the least to the same standard for review of errors as a defendant who receives a death sentence, particularly in light of the important constitutional right in question.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been hand-delivered to the Assistant District Attorney for Section "H" of Criminal District Court for the Parish of Orleans, 2700 Tulane Avenue, New Orleans, Louisiana 70119, Phone: 827-3565, Counsel for the State of Louisiana, this 11th day of MAY, 1992 in compliance with Supreme Court Rule 29.3.

All parties required to be served have been served.

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